

IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Donald S. Owens

SHARON BARNES and TIM BARNES,

Plaintiffs-Appellees,

v.

Docket No: 123661

DR. IVANA VETTRAINO, DR. WILLIAM
BLESSED, PROVIDENCE HOSPITAL
and MICHAEL ROTH, M.D.,

Defendants-Appellants,

and

JANE DOE,

Defendant.

BRIEF ON APPEAL - PLAINTIFFS-APPELLEES

ORAL ARGUMENT REQUESTED

SCOTT E. COMBS (P37554)
KATRINA A. MURREL (P53831)
LAW OFFICES OF SCOTT E. COMBS, PC
Attorney for Plaintiff-Appellees
27780 Novi Road, Suite 105
Novi, MI 48377
(248) 380-5050

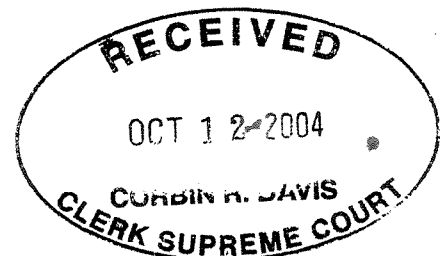


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JURISDICTIONAL STATEMENT

Defendant-Appellants' Statement of Jurisdiction is complete and correct.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION OF PLAINTIFF'S MEDICAL MALPRACTICE CLAIM, FOR FAILURE TO PROPERLY CONVEY TEST RESULTS, RESULTING IN PLAINTIFFS SEEKING A LATE TERM ABORTION, BECAUSE THIS IS NOT A "WRONGFUL BIRTH" CLAIM?

Trial court answered: yes

Court of Appeals answered: yes

Plaintiffs answer: yes

Defendants would answer: no

- II. WHETHER DEFENDANTS' ARGUMENT THAT THE CLAIM SHOULD BE BARRED ON THE BASIS OF THE WRONGFUL CONDUCT RULE, BECAUSE ABORTION IS ILLEGAL IN MICHIGAN, IS UNTIMELY AND MISPLACED

Trial court answered: was not asked this question

Court of Appeals answered: declined to answer this question

Plaintiffs answer: yes

Defendants would answer: no

COUNTER STATEMENT OF FACTS

Introduction:

This is NOT an action for “wrongful birth.” This is an action for medical malpractice, caused by the Defendants’ failure to properly interpret and convey test results showing that Plaintiff’s baby’s suffered from Trisomy 9, in a timely manner, resulting in Plaintiff having to seek a late term abortion in Kansas.

Facts:

In December 1997, the Plaintiff Sharon Barnes and her husband, who had a healthy son, decided to try to have another child. After 5 and a 1/2 months of attempting to conceive, Mrs. Barnes became pregnant and was given an estimated delivery date of February 25, 1999. She presented to her OB/GYN, Dr. Michael Roth every month and ultrasounds performed at 4 weeks and 13 weeks were apparently normal. Due to her age (Sharon would be 37 at the time of delivery), Dr. Roth recommended that she have an amniocentesis. Mrs. Barnes agreed, and she and her husband advised Dr. Roth that in the event that there were abnormalities that they would terminate the pregnancy. Dr. Roth indicated that the amniocentesis should therefore be performed at 15 weeks so that if they needed to terminate the pregnancy they could “do it early.”

When she reached her 15th week, Sharon presented to Dr. Vettraino at the Providence Pavilion for an amniocentesis. On September 4, 1998, an ultrasound was performed and the nurse indicated that the baby appeared to be 14 weeks

old and indicated that there appeared to be fluid in the kidneys. Following the ultrasound the patient and her husband met with Dr. Vettraino to discuss the ultrasound and to determine whether to proceed with the amniocentesis. Dr. Vettraino advised that the baby appeared small and that the fluid in the kidneys had been seen in both normal babies and those with Down's Syndrome. She indicated that testing for Down's Syndrome was most accurate after 15 weeks and that the safest time to perform the amniocentesis (in order to guard against miscarriage) was 16-18 weeks. Based on Dr. Vettraino's advice, Mrs. Barnes and her husband decided to wait until she was at 16 weeks to have the amniocentesis. They left the office depressed and worried about the possibility of Down's Syndrome.

On September 17, 1998, at her 16th week, Mrs. Barnes again presented to the Providence Pavilion for ultrasound and amniocentesis. The nurse who performed the ultrasound placed the baby development at 15 weeks and 3 days with an abnormal bowel and kidneys. Dr. Vettraino indicated to Mrs. Barnes that there were several possible explanations, i.e. a small baby, wrong dates, or genetic defects. Mrs. Barnes decided to go forward with the amniocentesis and per Dr. Vettraino's request, agreed to have blood drawn for what she was told were routine tests. When the nurse came to draw the blood she indicated that they were checking for cystic fibrosis as a shadow on the bowel was visualized on the ultrasound. Mrs. Barnes became very upset, as Dr. Vettraino had failed to

mention to her the possibility of cystic fibrosis. Dr. Vettraino was called in and confirmed the possibility.

On September 23, 1998, Mrs. Barnes received a phone call from Dr. Blessed, an associate of Dr. Vettraino. Dr. Blessed informed her that the Down's Syndrome test was negative but that the baby had 47 chromosomes (a partial #9 and a marker on 21). Dr. Blessed further indicated that if either she or her husband had the same set of chromosomes that the results were normal. He then informed the patient the baby was a girl - as had been hoped by both Plaintiffs.

On September 28, 1998, Mrs. Barnes and her husband presented to Dr. Vettraino's office at Providence to have blood drawn for DNA testing. They were advised that the results would take 2 and 1/2 to 3 weeks. On October 14, 1998, the patient called Dr. Vettraino's office and was informed by the nurse, Kim Youngquest that her husband's results were back and that he had 46 chromosomes. She was told that her results were not yet back.

Approximately 15 minutes later she received a call from the same nurse, who indicated that Mrs. Barnes' blood results were being faxed and that she would call her back shortly. After 45 minutes of waiting Mrs. Barnes called Dr. Vettraino's office and again spoke to Kim. The nurse indicated that "the baby matches your genetics." Mrs. Barnes was extremely relieved but felt the need to confirm the results. She specifically asked the nurse, "So you're saying that I have the same as the baby - - 47 chromosomes, a partial on 9 and a marker on 21?" Again, the nurse confirmed that there was a match. Mrs. Barnes then asked

about the results of the cystic fibrosis test and was informed that the results would be back from the lab on Monday October 19, 1998. Before hanging up she confirmed for a second time that she and the baby were a genetic match. Upon ending the conversation Mrs. Barnes was elated. She and her husband finally began to celebrate, prepare for the baby, buy maternity and baby clothes, discuss baby names, and share the news with family, friends and co-workers. On October 19, Mrs. Barnes received more good news - the cystic fibrosis test was negative.

On November 16, 1998, Mrs. Barnes presented to Dr. Vettraino for the performance of an echocardiogram for the baby, which was normal. The preliminary ultrasound showed that the baby measured 2 and 1/2 weeks smaller than should have but indicated that there was nothing in the genetics to explain the differential. Dr. Vettraino then confirmed that her genetics matched the baby's. Before leaving Dr. Vettraino's office an ultrasound was scheduled for 4 weeks later.

On November 18, 1998, Mrs. Barnes received a message from Dr. Vettraino's nurse that Dr. Vettraino had to see them that day. Mrs. Barnes immediately became upset and began crying, anticipating bad news. She and her husband immediately left work and went to Dr. Vettraino's office. Upon arriving, they were ushered into Dr. Vettraino's office. After a while Dr. Vettraino came in with the head administrator, Kathy Hautamaki. Dr. Vettraino advised Mr. and Mrs. Barnes that there had been a misrepresentation and a

misdiagnosis made in connection with the DNA results. She indicated that the patient's DNA did not in fact match the baby's but rather, Mrs. Barnes had only 46 chromosomes and no extra portion on #9. Stunned and devastated, the Barnes asked how this could have happened. Dr. Vettraino indicated that someone had made a mistake and that she was investigating to find out what had happened.

Dr. Vettraino advised them that the baby had Trisomy 9 which meant that there would be major health problems. Mrs. Barnes called her OB/GYN, Dr. Roth, who instructed them to come to his office to discuss the matter. Sobbing in disbelief at this turn of events, the Barnes left for Dr. Roth's office. During the meeting with Dr. Roth, he explained the major health problems/complications attendant to Trisomy 9. After learning about these problems, including retardation and numerous physical disfigurements requiring surgery, as well as the likelihood of death at a very young age, Mrs. Barnes and her husband decided to terminate the pregnancy. Dr. Roth indicated that he could do the procedure in his office, the following Monday and Tuesday. As they left, Dr. Roth's nurse indicated that she would check on insurance coverage and call to advise of an appointment time on Monday.

The following day however, Mrs. Barnes received a phone call from Dr. Roth's office during which his nurse indicated that his malpractice carrier had advised that he should not perform the procedure. Dr. Roth gave the patient a referral to an abortion clinic in the metro-Detroit area. Mrs. Barnes called the clinic and, after becoming emotionally upset during the conversation, the doctor

refused to take her as a patient. Mrs. Barnes called Dr. Roth's office and was told that he was out of town and could not be reached. Mrs. Barnes then called Dr. Vettraino who indicated that she would look into the situation and give her a call back later.

After not hearing from Dr. Vettraino, Mrs. Barnes called several times the next morning. At 1:00, with no word from Dr. Vettraino, Mrs. Barnes decided to go to her office. Mrs. Barnes was directed to the doctor's office and again met with Dr. Vettraino and the head administrator, Kathy Hautimaki. Dr. Vettraino advised her that she was going to have to go to Kansas to have the procedure done because she was past her 24th week of pregnancy and that she had spoken to Dr. Tiller, at a clinic there and faxed him information about her case, and was waiting to hear whether he would accept her as a patient. Faced with this new information, Mrs. Barnes called her husband and asked him to come down to the hospital.

Dr. Vettraino indicated to Mrs. Barnes that she did not know anything about the procedure and that because Providence was a Catholic hospital she could not be informed about the procedure or discuss the specifics. Instead, Dr. Vettraino gave her a phone number for Dr. Tiller's office and put her in a conference room so she could use the phone. Upon calling she was told that she needed to speak to Missy who would not be available for approximately 2 hours. Mrs. Barnes informed Dr. Vettraino that she had to wait and that in the

meantime she wanted to speak to Dr. Blessed in order to find out how such a devastating mistake had been made with the DNA results.

Mrs. Barnes then met with Dr. Vettraino, Dr. Blessed, Kathy Hautimaki, the administrator, and Constance Esper, from the hospital risk management department. Dr. Blessed told Mrs. Barnes that he had not seen the final genetics report but that one of the nurses had taken it upon herself to report the results. He acknowledged that a mistake had been made and that procedures were being reviewed to see why they had failed.

A short time later, Missy from Dr. Tiller's office called back and explained the procedure and indicated that it would take 4-5 days to complete, starting with termination of the baby's heartbeat. After dilation over the course of two days, the baby would be delivered. Mrs. Barnes was also advised of the potential risks and complications. She indicated that travel arrangements would be made by an agent, with which the clinic routinely worked and advised the Barnes to expect to encounter protesters at the clinic.

The Barnes had to make arrangements for the care of their two year old son and prepare to leave for Kansas early Sunday morning. Upon arriving at the clinic on Sunday they were indeed greeted by protesters, throwing flowers and pictures of babies and shouting at her, calling her a murderer. After making their way into the clinic and completing the required paperwork, the Barnes met with Dr. Tiller who explained the procedure and answered their questions. They were then taken to an exam room where an ultrasound was performed to

confirm the gestation and position of the baby. An injection was performed to terminate the heartbeat and laminaria was placed into the cervix to begin dilation. They were then released until 8:00 a.m. the next morning.

Upon returning the next morning they were again greeted by protesters at the clinic gate. After entering the clinic and being taken to an exam room, an ultrasound was performed to confirm that the baby was dead. More laminaria was placed into the cervix and Dr. Tiller advised her that she would experience severe cramping that evening and that possibly her water would break. Before leaving, Dr. Tiller warned them to expect even more protesters the next day.

The Barnes returned to their hotel. Mrs. Barnes took pain medication approximately every 4 hours. The cramping and pain became severe as the night progressed. Mrs. Barnes called the nurse at approximately 3:00 a.m. and was told that it was normal.

Upon returning to the clinic the following morning, the Barnes were greeted by a large group of protesters with signs and literature, screaming at them and throwing flowers on the car as they drove in.

After entering the clinic, another ultrasound was performed and an IV started. Medication was given to induce labor. Approximately two hours later, Mrs. Barnes was taken to the delivery room and began pushing with a lot of pain. Dr. Tiller came to the side of the bed and told her that there was a problem. Dr. Tiller indicated that the baby had not turned completely and that the baby's arm had come out of her vagina. Dr. Tiller was unable to get the baby turned

completely. Dr. Tiller then gave two options - one, he could amputate both arms and legs and try to work the baby out, or two, more laminaria could be placed to increase dilation so that the baby could be manipulated. However, a potential complication was that the uterus could possibly burst in which case she would be unable to have any more children.

Mrs. Barnes began sobbing and was incapable at that point of making a decision. She told Dr. Tiller to do what he thought was best. Dr. Tiller instructed the nurse to bring in 17 more laminaria sticks and after insertion Mrs. Barnes was taken back to the labor area. She was in and out of consciousness as the pain became increasingly unbearable. Hours later, Dr. Tiller determined that she was ready and she was taken back to the delivery room. Mrs. Barnes was medicated and the delivery completed. When it was over, Dr. Tiller advised them that he'd had to amputate the baby's arm. Mrs. Barnes was placed in the recovery room for approximately two hours before being released to return to the hotel.

On Wednesday morning Mr. and Mrs. Barnes returned to the clinic for the final time for a check-up and after being examined she was released to return home and given instructions to follow-up with her obstetrician after one week.

Mrs. Barnes continues to suffer from mental and emotional distress and has been diagnosed with post-traumatic stress disorder. Her work has been affected as well as her social life. She continues to have nightmares and traumatic memories of the events.

STANDARD OF REVIEW

The trial court's determination regarding a motion for summary disposition is reviewed *de novo*. *Stehilk v. Johnson* (On Rehearing), 206 Mich App 83,85; 520 NW2d 633 (1994), *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 650; 513 NW2d 441 (1994), *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), *aff'd* 446 Mich 482; 521 NW2d 266 (1994).

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations in support of the claim must be accepted as true, as well as any reasonable inferences that can be drawn from the facts. The motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Jackson v. Oliver*, 204 Mich App 122, 514 NW2d 195 (1994).

In reviewing a trial court's summary disposition decision, the reviewing court makes all legitimate inferences in favor of the nonmoving party. *Skinner v. Square D Co.*, 445 Mich 153, 162; 516 NW2d 475 (1994).

LAW AND ARGUMENT

I. THE TRAIL COURT CORRECTLY DENIED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION, AND THE COURT OF APPEALS PROPERLY UPHELD THAT DECISION, OF PLAINTIFF'S MEDICAL MALPRACTICE CLAIM, BECAUSE THIS IS A SIMPLE MEDICAL NEGLIGENCE CLAIM AND NOT A WRONGFUL BIRTH CASE.

This is not a claim for "wrongful birth," as Defendants have erroneously categorized it. Wrongful birth cases assume that a baby was born and involve an allegation that the baby involved should never have been born and seek damages for the birth and care of a defective child. *Taylor v. Kurapati*, 236 Mich App 315; 600 NW2d 670 (1999). There is no such allegation in this matter, as the baby in question was not born alive, but was in fact terminated. This is a claim for medical negligence and the resulting damages including, but not limited to, Mrs. Barnes' pain and suffering and the emotional and mental distress which the Plaintiffs have suffered as a direct result of that negligence.

Plaintiffs do not contend that the case which Defendant's primarily rely on, *Taylor v. Kurapati*, is the current status of the law on wrongful birth cases. However, *Taylor* is distinguishable from the case at bar. In *Taylor*, the Plaintiffs brought an action against the physician who had performed an ultrasound and failed to inform them of the possibility of birth defects. The child was born alive, with many physical and mental impairments. They alleged that, had they known of the possibilities of abnormalities, they would have terminated the pregnancy. These Plaintiffs sought damages for negligent infliction of emotional

distress as a result of seeing the birth of a defective child that they thought was healthy and the cost of raising their disabled child to the age of majority.

This case is easily distinguishable from *Taylor*. First of all, this is not a case for wrongful birth, as *Taylor* was. Plaintiff did not have a live birth of her child. Plaintiffs decided early on to terminate the pregnancy in the event of possible birth defects, and did so, late into the pregnancy.

Second, this is not a case where Defendants failed to provide the Plaintiff with information that would make it more likely that she would elect to have an abortion, as *Taylor* was. This is a case where the Defendants improperly read and conveyed test results to the Plaintiff, leading her to believe that her pregnancy and the child were normal. This improper diagnosis and failure to disclose the correct information delayed Plaintiff's decision until much later in the pregnancy, resulting in Plaintiff having to leave this State and seek a late term, surgical termination of her pregnancy.

In *Taylor*, the Court states, "at its intellectual core, the wrongful birth tort this Court created in *Eisbrenner* relies on the benefits rule this Court adopted in *Troppi*. The benefits rule described by the court is that of weighing of the benefits of the child against all the elements of claimed damage, weighing the costs to the parents of a disabled child of bearing and raising that child against the benefits to the parents of the life of that child." *Troppi, v Scarf*, 31 Mich App 240, 187 NW2d 511 (1971); *Taylor, supra*. Sharon Barnes seeks no such compensation, as her child was never born.

Although it may sound callous, Mrs. Barnes' case is no different than that of a patient who needed to have a simple gall stone removal procedure, whose doctor failed to timely diagnose the condition, until the point at which that patient had to have a major surgical procedure to remove an entire body organ; or that of a patient with a minor infection, whose physician failed to timely diagnose the condition, thereafter the patient having to endure a major surgical procedure to remove the infection and the affected area.

Mrs. Barnes was told of the possibilities of abnormalities, she and her husband made an informed decision, that if there were abnormalities, they would abort the pregnancy. They advised their physician of this and were told to be sure to have the amniocentesis done sooner rather than later, so that if there were abnormalities, the abortion could be done early. The defendants failed to correctly advise the Plaintiff of the defects and in fact misinformed the Plaintiff of the test results, thus eliminating the opportunity for her to receive an early, simple suction procedure abortion (legal in the State of Michigan), necessitating the trip to Kansas for a late term abortion, a procedure which required 4 to 5 days, and actual labor and delivery of the baby.

The *Taylor* case and those that it relies on do not dispute that there may be damages for pain and suffering and "injury to a person" resulting from a "birth-related tort", *id* at 681. Plaintiffs seek medical malpractice damages for economic and non-economic losses resulting from Defendants negligent diagnosis

and treatment. Plaintiff is not seeking compensation for damages related to the birth or care of the child.

Defendants have a duty to properly read test results and properly convey those test results to the Plaintiff, for whatever reason, be it for kidney stones or birth defects. Their negligent failure to do so resulted in injury and harm to the Plaintiff, which defendants should be responsible for. The fact that these injuries arose in a situation resulting in an abortion should not prevent Plaintiffs from seeking compensation for their harm.

Plaintiff further points this Courts attention to the Concurring Opinion in the *Taylor* case, in which it is noted that the issue of whether Michigan recognizes a wrongful birth cause of action was not brought before that Court (the issue before the court was whether Plaintiffs had complied with the statute of limitations governing malpractice actions) and therefore, any discussion within the opinion beyond their determination that Plaintiffs had not complied with the applicable statute of limitations is merely dicta and NOT of any precedential value and “a waste of judicial time and resources” *id* at 694.

This is a simple medical malpractice claim, brought pursuant to MCL 600.2912a. This is not a “wrongful birth” or “wrongful infliction of abortion” claim. Plaintiffs seek damages for pain, suffering, mental anguish and emotional distress which occurred as a result of Defendants failure to properly and timely convey test results. This is a statutorily and common law authorized claim which must be tried on its merits.

II. DEFENDANTS' ARGUMENT THAT THE CLAIM SHOULD BE BARRED ON THE BASIS OF THE WRONGFUL CONDUCT RULE, BECAUSE ABORTION IS ILLEGAL IN MICHIGAN, IS UNTIMELY AND MISPLACED

This issue was not raised in any fashion, or addressed in any fashion in the trial court and, thus, was not preserved for appeal. This court is under no obligation to consider it. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335(2000). Since Defendant failed to raise the "wrongful conduct rule" issue in the lower court, this issue was not preserved for appeal and this court need not address it. *Booth Newspapers, Inc v Univ of Michigan Bd Of Regents*, 444 Mich. 211, 234; 507 N.W.2d 422 (1993); *Russell v Dep't of Corrections*, 234 Mich. App. 135, 139; 592 N.W.2d 125 (1999). *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich. 691, 719-720; 614 N.W.2d 607 (2000); *Kent County Aeronautics Bd v Dep't of State Police*, 239 Mich. App. 563, 580; 609 N.W.2d 593 (2000), *aff'd Byrne v State*, 463 Mich. 652; 624 N.W.2d 906 (2001).

In the event this court decides to consider the "wrongful conduct rule" argument, Plaintiff's do not dispute that Michigan law favors life and prohibits late term abortions. However, preventing plaintiff from recovering for Defendants blatant negligence would also be contrary to Michigan law and public policy, see MCL 600.2912.

The wrongful conduct rule is "rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Orzel v Scott Drug Co*, 449 Mich 550; 537 NW2d 208 (1995).

Plaintiffs do not base their cause of action on their “own illegal conduct.” Their cause of action is based on Defendants’ negligence in failing to provide accurate test results in a timely fashion. Had Defendants done so, there would have been no need for an abortion that could not be done in Michigan. Plaintiff’s conduct would have been well within the law. Applying the “wrongful conduct” rule would allow Defendants to escape liability by waiting to convey the accurate results until after the fetus reached viability. This would clearly be against public policy in the state of Michigan, promoting proper and timely medical care.

Defendants’ reliance on *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307(2000) is wholly misplaced. This was a governmental immunity, “police chase” negligence claim, wherein, in dicta, the court stated that the “wrongful conduct rule” would prevent recovery by the driver of the vehicle. In that claim, the chase and accident took place here in Michigan and the driver was violating Michigan law, here in Michigan. Plaintiff did not violate any law. Plaintiff did not have a late term abortion in Michigan and she did not violate any Michigan (or Kansas) law by traveling to Kansas to obtain the late term abortion (which was done on the referral of Dr. Vettraino).

Plaintiffs seek damages for pain, suffering, mental anguish and emotional distress which occurred as a result of Defendants failure to properly and timely advise them of test results. This is a cause of action well established under Michigan common law and statutes authorizing a cause of action for medical

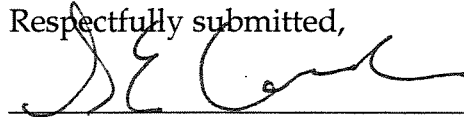
malpractice, MCL 600.2912a and must be remanded to the trial court for further determination.

CONCLUSION AND RELIEF REQUESTED

This is not a "wrongful birth" case. This is a claim for medical malpractice arising out of the Plaintiff's care and treatment by Defendants. The pregnancy could and should have been terminated legally in Michigan, during a simple suction procedure. Instead, the fetus grew over the weeks that the misdiagnosis remained, resulting in a horrendous, extensive surgical procedure that had to be done in Kansas. The malpractice here is the same as if it was a misdiagnosed bad piece of bowel, allowed to grow, subsequently requiring a more extensive surgery and recovery, which would have been unnecessary if originally diagnosed properly.

Based on the foregoing, Plaintiff respectfully requests this Court affirm and uphold the Court of Appeals and Trial Court decisions and remand this case back to the Trial Court for trial on the merits.

Respectfully submitted,



SCOTT E. COMBS (P37554)
Attorney for Plaintiff-Appellee
27780 Novi Rd. Ste. 105
Novi, MI 48377
(248) 380-5050

Dated: October 6, 2004

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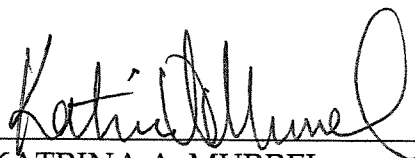
CERTIFICATE OF SERVICE

KATRINA A. MURREL, certifies that two copies of Plaintiff-Appellee's
Brief on Appeal and this Certificate of Service has been served via regular U.S.

Mail, this 11th day of October, 2004 on:

LINDA M. GARBARINO (P38359)
Attorney for Defendants-Appellants
Vettraino and Blessed and
Providence Hospital
645 Griswold Street, Suite 2800
Detroit MI 48226

JAMES GROSS (P 28268)
Attorneys for Defendant-Appellant Roth
615 Griswold, Suite 1305
Detroit, Michigan 48226


KATRINA A. MURREL